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SUPREME COURT, U.S.
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No. 07-1341

IN THE

Supreme Court of the United States

ANDREW POLICASTRO,

Petitioner,

v.

THEODORA P. KONTOGIANNIS, Principal Tenafly High School; TENAFLY BOARD OF EDUCATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the First Amendment allow public school teachers to place a memo (private speech) in the teacher mailboxes?

2. Can a "plain vanilla" memo placed in the teacher mailboxes cause a "material and substantial disruption"?

3. Is a prior approval policy Constitutional (regarding teacher free speech in the teacher mailboxes) without any guidance on denial?

4. Can a pro se First Amendment lawsuit be moot for lack of damages when damages are clearly on the record but not in the original complaint?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
REASONS FOR DENYING THE PETITION	6
I. THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT PETITIONER'S FIRST AMENDMENT FREE SPEECH CLAIM WAS MOOT AND NON-JUSTICIABLE IN LIGHT OF PETITIONER'S ACKNOWLEDGMENT THAT HE DOES NOT SEEK DAMAGES	6
II. THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT TENAFLY'S POLICY, WHICH REGULATES ITS EMPLOYEES' USE OF THE MAILBOXES FOR PERSONAL, NON-SCHOOL RELATED BUSINESS IS NOT OVERBROAD	8

Contents

Page

III. PETITIONER'S FIRST AMENDMENT CLAIM DOES NOT PROVIDE A BASIS TO GRANT THE PETITION SINCE THIS CLAIM WAS NEVER ADDRESSED BY THE THIRD CIRCUIT 13

CONCLUSION 14

Contents

Page

Proposition III:

Certiorari Should be Denied Because The Tenth Circuit Properly Applied Oklahoma Law Pursuant to the Erie Doctrine When It Determined that the Loan Agreement was not Modified 9

A. Petitioner Misstates the Tenth Circuit's Ruling 10

B. The Tenth Circuit Properly Applied Oklahoma Law to the Facts of the Case 11

Conclusion 13

Cited Authorities

Page

Perry Education Assn.
v. Perry Local Educators' Assn.,
460 U.S. 37, 103 S. Ct. 948 (1983) 10, 12

Rhodes v. Stewart,
488 U.S. 1 (1988) 7

Texas State Teachers Assn.
v. Garland Independent School District,
777 F.2d 1046 (1985) *aff'd*,
479 U.S. 801 (1986) 12

Petitioner requests that this Court exercise its discretionary powers and review the Third Circuit Court of Appeals' decision holding that Petitioner's First Amendment free speech claim was moot and that the Tenafly Board of Education's mailbox policy was not constitutionally overbroad facially or as-applied to him. There is no reason, and Petitioner has offered none, to grant certiorari. There is no circuit split on these holdings. The Third Circuit's decision does not conflict with any decision of this Court. Instead, Petitioner seeks to invoke this Court's supervisory power simply because he asserted a First Amendment free speech claim. Petitioner acknowledged during trial at the District Court and before the Third Circuit that he was not seeking damages for the alleged First Amendment free speech violation. Given that Petitioner waived any claim for damages the Third Circuit correctly held that his First Amendment free speech claim was moot. An appellate decision favorable to the Petitioner would not have required any action on the part of Respondents. It would be no more than a "moral victory" for Petitioner. Petitions for certiorari are not granted so that a litigant can obtain an advisory opinion and a "moral victory." Therefore, the petition for certiorari should be denied.

STATEMENT OF THE CASE

This case arises out of Petitioner Andrew Policastro's contention that he has the right, under the freedom of speech provision of the First Amendment of the United States Constitution, to indiscriminately use the teachers' mailboxes at the Tenafly High School to distribute anything he chooses. The First Amendment provides no such right.

Petitioner is a teacher at the Tenafly High School. On March 13, 2002 a memo concerning a private grievance that 13 teachers had with their union was distributed to all staff members through the teachers' mailboxes at Tenafly High School. The memo, entitled "Questions for the Tenafly Negotiations Team" posed questions about the proposed contract and the union's negotiation strategy that the thirteen signatories had for and about the teachers' union negotiating team. Petitioner was one of the 13 teachers to sign the memo distributed. The memo was placed in the teachers' mailboxes at Tenafly High School between 8:15 and 8:30 a.m., during a regular school day. March 13, 2002 also happened to be ratification day of the new collective negotiations agreement between the teachers union and the school board.

The trial record established that the memo had nothing to do with the students or the curriculum at Tenafly High School, but merely set forth 13 teachers' disagreement with the teachers' union negotiating strategy. A maelstrom of discontent ensued among teachers and other staff members, the exact reaction the signers of the document intended, except that it happened during school hours rather than at the union meeting that afternoon. The high school became engulfed in controversy; staff began to discuss the memo, agitated and upset with its contents. Teachers called other teachers and union leaders to complain, some within the high school and some without the high school.

Complaints also were made to the high school principal, Dr. Theodora Kontogiannis, over distribution of the memo. Kontogiannis was informed that the memo was causing an "alarming amount of discussion" which was disrupting the normal academic flow in the library and elsewhere while students waited to be accommodated by the teaching staff. Alarmed by the atmosphere that this memo had created in her school and desirous to return the employees to their task at hand, i.e. education of students, Dr. Kontogiannis removed the memo from the mailboxes and locked the mailroom door until the end of the school day.

Policastro, as one of the signers of the memo, contended that his right to free speech was violated by Dr. Kontogiannis' actions. He also complained that the Tenafly Board of Education's policy regulating the use of the mailboxes by its employees was overbroad and therefore violative of the First Amendment.

Following a one day bench trial, District Court Judge Joel A. Pisano found that the actions of Dr. Kontogiannis were reasonable and constitutionally permissible based on the facts of the case and concluded that a disruption had occurred at the high school that morning which threatened to interfere with school operations. Further, Judge Pisano concluded that the policy regulating personal use of the mailboxes by the Board's employees was reasonable. Therefore, he entered judgment in favor of the Respondents.

The Third Circuit affirmed the District Court, finding that the mailbox policy was not overbroad, holding

> We agree that the record fails to show that the Mailbox Policy has had an actual or potential chilling effect on teacher speech. Policastro admits that "[s]ince the removal of the memo .. use of the mailboxes by teachers for personal messages (memos, notes, cards, etc.) has continued as usual, without prior approval." Policastro brief at 5. Accordingly we will affirm the District Court's denial of Policastro's overbreadth challenge. *Policastro v. Kontogiannis*, 2008 U.S.App. LEXIS 1387, at *6 (3d Cir. Jan. 24, 2008).

The Third Circuit also affirmed dismissal of Petitioner's as-applied challenge to the mailbox policy, finding that there was no evidence that the policy had been applied to Petitioner or that he had suffered any injury as a result of the mailbox policy.

Petitioner's claim that his right to free speech under the First Amendment was violated was also analyzed by the Court of Appeals. Noting that Petitioner did not seek damages but sought declaratory and injunctive relief only, the Third Circuit dismissed the claim as non-justiciable. In this regard, the Court of Appeals noted that injunctive relief was unavailable and that "declaratory relief would amount to no more than an advisory opinion regarding the "wrongfulness" of past conduct." *Id.* at *10 (citing *Green v. Branson*, 108 F.3d 1296, 1299-1300 (10th Cir. 1997)) Thus, the District

Court's holdings on the facial and as-applied challenge to the mailbox policy were affirmed and Petitioner's First Amendment claim was dismissed as moot.

SUMMARY OF ARGUMENT

The central issue presented is whether the Third Circuit was correct to dismiss Petitioner's claim that his First Amendment right to free speech was violated, holding that since damages were not sought, the issue was moot. Yet Petitioner spends little to no time in his Petition addressing this holding. No case law was cited from this Court or any other sister Circuit to demonstrate that the Third Circuit's decision is in conflict with established law. In short, Petitioner fails to show that the Third Circuit's ruling is erroneous in manner to warrant the exercise of this Court's supervisory review powers.

From the earliest time in our country's jurisprudence, this Court has recognized that Article III of the United States Constitution requires that federal courts decide an actual case and controversy between the parties. Federal courts are not empowered to render advisory opinions, speculating on what may happen in the future. While exceptions to this rule have been established, none fits within the facts of this case.

Petitioner also argues that the mailbox policy is overbroad and that he should not have to request permission to distribute personal, non-school business materials through the mailboxes. While Petitioner appears to conflate a vagueness challenge and an overbreadth challenge, the First Amendment does not

entitle Petitioner to arbitrary and unfettered use of Tenafly's teachers' mailboxes. The policy on use of the teachers' mailboxes is reasonable. It does not prohibit speech, but merely ensures that the mailboxes are used for their intended and primary purpose — school business. The Third Circuit correctly ruled that the policy was not overbroad and was a reasonable regulation of the use of a non-public forum.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT PETITIONER'S FIRST AMENDMENT FREE SPEECH CLAIM WAS MOOT AND NON-JUSTICIABLE IN LIGHT OF PETITIONER'S ACKNOWLEDGMENT THAT HE DOES NOT SEEK DAMAGES

Petitioner spends the majority of his petition citing to First Amendment case law involving the free speech rights of students in public schools and pays little attention to the issue of whether his claimed violation of the First Amendment is justiciable in the first instance. The Third Circuit's holding on the justiciability of Petitioner's First Amendment free speech claim was correct since Petitioner acknowledged at trial, before the Third Circuit, and admits in his Petition that he does not want money from this lawsuit. The Court of Appeals opinion on this issue is in accord with Supreme Court precedent.

This Court has consistently held that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North*

Carolina v. Rice, 404 U.S. 244, 246 (1971). The lack of power to review moot cases derives from the requirement of Article III of the Constitution that there be an actual case and controversy to adjudicate. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). When relief cannot be afforded to a litigant through the issuance of a judicial opinion, it amounts to no more than an advisory opinion, which the federal courts have long held they will not issue. See *Rice*, supra, at 246.

In the case at bar, Petitioner is seeking what would amount to an advisory opinion from this Court that Respondents' actions over 6 years ago violated the First Amendment. Yet, such an opinion does not require the Respondents to take any action since Petitioner does not seek damages as a redress. The facts of record demonstrate that the removal of the memo on March 13, 2002 was a one-time incident based on the events that transpired that morning at the high school. No memos had ever been removed before that date and none had been removed at the time that matter was tried. In other words, in the absence of a claim for damages for that one incident 6 years ago, which Petitioner does not seek, his claim of a violation of the First Amendment is moot. Quoting this Court, the Third Circuit recognized that "[t]he real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant toward the plaintiff*." *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)) (emphasis in original).

Petitioner might achieve some moral victory with an advisory opinion, but that moral victory would not require Respondents to take any action to account for the removal of the memo on March 13, 2002. Nor can it be said that the same set of circumstances, incident and conduct might arise in the future, thereby invoking the "capable of repetition, but evading review" exception to the mootness doctrine. Whatever may occur in the future relative to the teachers' mailboxes in Tenafly or elsewhere can be judged and decided on the facts and circumstances of that matter since any inquiry into a violation of the First Amendment is fact-sensitive. *See, e.g., Defunis v. Odegaard*, 416 U.S. 312, 319 (1974). Review of the Third Circuit's holding is unnecessary as it is in accord with established case law and the Petition presents no reason to review the Court of Appeals' mootness determination.

II. THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT TENAFLY'S POLICY, WHICH REGULATES ITS EMPLOYEES' USE OF THE MAILBOXES FOR PERSONAL, NON-SCHOOL RELATED BUSINESS IS NOT OVERBROAD

The Petition contends that the Tenafly mailbox policy is overbroad and should be declared unconstitutional because it requires prior approval from the school building principal before distribution of personal, non-school business items. Petitioner's brief conflates an overbreadth challenge with a vagueness challenge. Nonetheless, the only issue is whether the Third Circuit correctly concluded that the policy was not overbroad on its face or as-applied.

The Tenafly Board of Education's Administrative Manual for Teachers explains that "Mailboxes are the property of the Tenafly Board of Education and should be used for school business." Staff members, including teachers, who wish to distribute "flyers/announcements, etc. (via the mailboxes) must have prior approval from the principal or vice-principal."

An individual may challenge a regulation or policy under the First Amendment overbreadth doctrine, because "[its] very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broderick v. Oklahoma*, 413 U.S. 601, 612 (1973). As the Third Circuit noted in its opinion below, "avoidance of this chilling effect is at the heart of the overbreadth doctrine." *Gasparinetti v. Kerr*, 568 F.2d 311, 317 (3d Cir. 1977). A court must consider that the overbreadth doctrine is "strong medicine" that should be used "sparingly and only as a last resort." *Id.* at 613. In that vein, "a single impermissible application" is insufficient to deem a policy invalid, *New York v. Ferber*, 458 U.S. 747, 772 (1982) (internal quotation marks and citation omitted), and instead, "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." *Id.* at 771.

The Tenafly mailbox policy is a reasonable regulation of a non-public forum; thus Tenafly's regulation and control over the use of its mailboxes does not violate the First Amendment. A policy challenged on its face as overbroad must be analyzed dependent on the nature of the forum. Property that is a non-public forum may be reserved by the government for its intended

purposes "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S. Ct. 948 (1983). In other words, the restriction on speech must not discriminate based on viewpoint and must be reasonable in light of the purpose served by the forum. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that prior restraints in nonpublic forums are permissible when reasonable and viewpoint neutral).

The Third Circuit affirmed the District Court's findings that the policy had no actual or potential chilling effect on First Amendment rights. Importantly, the trial record was replete with examples that both before and after the incident on March 13, 2002, teachers, including Petitioner, distributed personal items through the mailboxes. In fact, the record reflects that Petitioner utilized the mailboxes to distribute personal items only one time before March 13, 2002, but two or three times after that date. Petitioner acknowledged to the Third Circuit that teacher use of the mailboxes for personal items continued without prior approval. Thus, Petitioner can hardly argue that the policy or actions of Dr. Kontogiannis "chilled" his First Amendment rights to free speech. That Petitioner does not want to seek permission to distribute personal, non-school business material through the mailboxes does not make Tenafly's policy unconstitutionally overbroad.

Further, the Third Circuit found support in the record for the District Court's conclusions that no one was ever denied permission to use the mailboxes; that

no personal item had ever been removed from the mailboxes but the subject memo; and that, as Dr. Kontogiannis testified, the mailboxes are the primary way in which administration, parents and students communicate with teachers. Thus, the regulation is reasonable in light of the purpose served by the forum. The mailboxes are, unequivocally, for school business. Regulation over what and how much personal, non-school business materials are distributed through the mailboxes is necessary lest the teachers' mailboxes become inundated with flyers, memos, advertisements, personal notes, solicitations of all kinds and other non-school business related documents. It is not difficult to imagine that without some control over what and how much is placed in teacher mailboxes, important announcements from administration officials could go unnoticed or be discarded by teachers as simply junk mail. "[R]estrictions on speech in a non-public forum may be imposed if it is reasonable to anticipate that interference with the [purpose of the forum] *may* occur, even though it has not yet occurred." *Paff v. Kaltenbach*, 204 F.3d 425, 433 (3d Cir. 2000) (emphasis in original). The Tenafly policy ensures that the building principal retains control over the use of teachers' mailboxes so that announcements which need to get to the teaching staff will get to them. The policy on its face is viewpoint neutral and is in accordance with settled law.

Petitioner's advocation for unfettered use of the mailboxes for any purpose so long as the communication is not lewd or vulgar misses the point. In a school environment, such communication can always be prohibited. To provide the access to the mailboxes for which Petitioner urges would turn the mailboxes into a

repository for distribution of every conceivable personal communication, from the sale of personal items to new business opportunities to rental properties available. The possibilities are endless.

When considering the reasonableness of the policy, the Court must recognize that Petitioner has access to alternative channels of speech. Teachers and staff can communicate with one another via U.S. mail, in-person, by telephone, outside the workplace, during non-working time in the school, such as lunch, in teacher offices, faculty rooms or utilize the teacher bulletin board in the attendance office. Unrestricted access to the teachers' mailboxes is not required under the First Amendment merely because it may be the most efficient way of communication with other teachers. *Cornelius*, 473 U.S. at 809 (1985). The First Amendment is not violated by Tenafly's retention of control over a non-public forum. *Perry*, 460 U.S. at 49.

The cases relied on by Petitioner are inapposite to the Tenafly policy. In *Texas State Teachers Assn. v. Garland Independent School District*, 777 F.2d 1046, 1055 (1985) *aff'd*, 479 U.S. 801 (1986), the Fifth Circuit held that a district policy, which permitted teachers to use the internal mail system to communicate with each other for any reason, except for subjects involving employee organizations, was unconstitutional. The Garland policy could not pass a reasonableness standard because it prohibited speech based on content. Tenafly's policy is viewpoint neutral. Likewise, Petitioner's reliance on cases involving public fora is misplaced since the Tenafly's teachers' mailboxes are not equivalent to a public street.

Finally, the Third Circuit affirmed the District Court's finding that Kontogiannis removed the memo on March 13, 2002 because of the disruption with the teachers and the school's operation that morning. The record was devoid of evidence that Kontogiannis relied upon the mailbox policy to support the action she took. As such, there is no evidence that the policy was ever applied to Petitioner or that he was injured by such an application. Thus, there is no compelling reason to review the Third Circuit's holding that the mailbox policy is not overbroad and is not overbroad as applied to Petitioner.

III. PETITIONER'S FIRST AMENDMENT CLAIM DOES NOT PROVIDE A BASIS TO GRANT THE PETITION SINCE THIS CLAIM WAS NEVER ADDRESSED BY THE THIRD CIRCUIT

Although the Petitioner devotes the majority of his petition to the claim that his First Amendment rights were violated when the memo was removed from the mailboxes, the Third Circuit Court of Appeals did not reach this issue since it found Petitioner's claim moot. Therefore, Respondents will not address an issue that was not addressed by the Court of Appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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